No. 72-1560

Supreme Court, U.S.
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MICHAEL RODAK, JR.

In the Supreme Court of the United States

NATIONAL FAMILY INSURANCE COMPANY,
a Minnesota Corporation,

Petitioner,

vs.

EXCHANGE NATIONAL BANK OF CHICAGO,
a National Banking Association,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

EDGAR BERNHARD
ROBERT W. GETTLEMAN
33 North LaSalle Street
Chicago, Illinois 60602
312-CE 6-9200
Attorneys for Respondent

Of Counsel,
SELWYN ZUN
MORTON DENLOW
D'ANCONA, PFLAUM, WYATT & RISKIND
33 North LaSalle Street
Chicago, Illinois 60602
312-CE 6-9200

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, and the dissenting opinion (App. A of the Petition) are reported at 474 F.2d 237.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

ISSUES PRESENTED

1. Does any ground exist in the instant case for the granting of a writ of certiorari?

2. Did the district court improperly dismiss the complaint on the basis of the Illinois statute of limitations, on the ground that plaintiff knew or should have known of its cause of action against defendant more than five years prior to the filing of the complaint?

3. Do the procedural arguments, raised by plaintiff for the first time on appeal, have merit, since a full trial on the limitations issue was conducted below and since plaintiff raised no objection to the proceedings?

CONSTITUTIONAL PROVISION, STATUTES, AND RULES INVOLVED

The pertinent provisions of the Constitution of the United States, United States Code, and the Federal Rules of Civil Procedure are set forth as follows:

Constitution of the United States, Amendment 7
(set forth in Appendix to Petition)

Judiciary Act of 1865 §4
13 United States Statutes at Large 501
(Appendix B of this responsive brief)

United States Supreme Court Rule 19
(Appendix C of this responsive brief)

Federal Rules of Civil Procedure:

Rule 12(b)
(Appendix D of this responsive brief)

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Rule 46
(Appendix G of this responsive brief)

Rule 56
(set forth in Appendix to Petition)

Illinois Revised Statutes, ch. 83, §16
(set forth in Appendix to Petition)

STATEMENT OF THE CASE.

Plaintiff, National Family Insurance Company of St. Paul, Minnesota, is seeking review of the affirmance, by the United States Court of Appeals for the Seventh Circuit, of an Order of the United States District Court for the Northern District of Illinois dismissing an action against Defendant, Exchange National Bank of Chicago. The dismissal was based upon the fact that the five-year Illinois Statute of Limitations had run prior to the date of the filing of the complaint, September 23, 1970. The complaint alleged that defendant had fraudulently misrepresented the financial status of a company which had reinsured 100% of plaintiff's insurance obligations.

The limitations issue was raised by defendant's motion to dismiss (later converted by defendant, in the alternative under Rule 12(b), Fed. Rules Civ. Proc., to a motion for summary judgment; App. 200), and was pursued by full briefing by the parties, including the submission of a number of exhibits, affidavits, and counter-affidavits, as well as the taking of depositions. Plaintiff, in its memorandum in opposition to the motion to dismiss, asked the

trial court to allow the presentation of evidence concerning its defense to the statute of limitations. (App. 202-203.) On May 3, 1970, the district court issued a memorandum opinion which decided the contested issues of law in defendant's favor, but concluded that certain factual issues remained which would preclude summary judgment. Due to the complexity of the case, however, the court ordered a separate factual hearing on the limitations issue. (App. 99-105.) The depositions were subsequently taken in Minnesota and filed with the district court.

Two hearings were held before Judge McGarr on June 9 and June 23, 1970, at which plaintiff presented several witnesses and, along with defendant, argued the case to the court. At no time was any objection ever made as to the propriety of the hearing, until plaintiff's brief was filed in the court of appeals, nor did plaintiff ever otherwise indicate in any way—either before, during or after the hearing—its desire to have any factual questions raised by the limitations issue decided by a jury.

At the conclusion of the June 23 hearing, Judge McGarr rendered his opinion from the bench, finding that plaintiff knew or should have known of its cause of action, if any, against defendant at latest during the summer of 1965, more than five years before the filing of the present action. Accordingly, the court concluded, the statute of limitations had run and the action was dismissed. (App. 155-156.)

On appeal, the Seventh Circuit, per Hastings, J., affirmed, holding that "the district court was amply justified in finding and holding that plaintiff knew or should have known of its cause of action against defendant more than five years prior to filing its complaint on September 23,

1970." The court of appeals further denied plaintiff's "belated contention" that it was denied its right to a jury trial, holding that the district court did not act summarily and that plaintiff had waived its right to a jury—an issue raised for the first time on appeal. Even the dissenting opinion fully agreed with the latter holding.

STATEMENT OF FACTS

Plaintiff's statement of facts is substantially incomplete and one-sided. A more thorough treatment of the facts is found in the opinion of the court of appeals (Appendix A of the Petition).

The synopsis of the newspaper articles (App. 15-20) is referred to by plaintiff (Petition, p. 6) as set forth in the Addendum to its Petition, but does not appear therein. Defendant has reproduced the synopsis as Appendix A to this responsive brief.

ARGUMENT

I.

THE PETITION FOR CERTIORARI SHOULD BE DENIED SINCE NO GROUND EXISTS FOR THE GRANTING OF THE WRIT.

The exercise of certiorari jurisdiction has been the frequent subject of scholarly debate and pronouncements of the Court and its Justices. In *Magnum Co.* v. *Coty*, 262 U.S. 159, 163 (1923), Chief Justice Taft, in much quoted language, stated:

> "The jurisdiction [of the Supreme Court to review cases by certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that eighty percent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

The petition in the instant case falls within the category of cases referred to by Chief Justice Taft as outside the scope of Supreme Court review. Plaintiff seeks in this Court, as it did in the court of appeals, a general review of the factual determinations of the district court. The obvious weakness of the argument on the facts was attempted to be overcome by plaintiff's raising the issue of the right to a jury trial—an afterthought raised for the first time on appeal, and an issue not even contested in the dissenting opinion.

Plaintiff's main complaint of the factual inadequacy of the judgment of the district court is insufficient to invoke

this court's certiorari jurisdiction. As stated by Mr. Justice Holmes in *United States* v. *Johnston*, 268 U.S. 220, 227 (1925), this Court does "not grant a certiorari to review evidence and discuss specific facts." Especially is this so when, as in the instant case, such findings have been affirmed by a court of appeals. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).

It was in the court of appeals that plaintiff complained for the first time that it had been denied the right to a jury trial by the district court's holding of an evidentiary hearing concerning the issue of the statute of limitations—a hearing which was requested by plaintiff itself (App. 202-203) and in which plaintiff appeared and participated without any mention of a jury demand. The consequent waiver, as found by the court of appeals, is manifest from the record.

Thus, plaintiff's arguments have no basis in law or in fact, and in addition fail to rise to the standards enunciated by this Court and by Supreme Court Rule 19 as appropriate for certiorari jurisdiction.

II.

PLAINTIFF'S ARGUMENTS ARE WITHOUT MERIT SINCE THE FACTUAL FINDINGS BY THE DISTRICT COURT AND THE FINDING OF WAIVER OF THE RIGHT TO A JURY BY THE COURT OF APPEALS ARE AMPLY SUPPORTED BY THE RECORD.

A. THE COMPLAINT WAS PROPERLY DISMISSED SINCE THE RECORD INDISPUTABLY ESTABLISHES THE FACT THAT PLAINTIFF KNEW OR SHOULD HAVE KNOWN OF ITS CAUSE OF ACTION AGAINST DEFENDANT MORE THAN FIVE YEARS PRIOR TO THE FILING OF THE COMPLAINT.

1. THE UNDISPUTED FACTS DEMONSTRATE THAT PLAINTIFF WAS PUT ON NOTICE OF ITS CAUSE OF ACTION MORE THAN FIVE YEARS PRIOR TO SEPTEMBER 23, 1970.

The record below fully supports the finding of the district court that the five-year Illinois statute of limitations had run prior to the institution of this action on September 23, 1970. The documentary evidence and depositions introduced by defendant, and summarized by the opinion of the court of appeals, demonstrate that the cause of action asserted by plaintiff accrued in the spring, or at latest, the summer of 1965, and that plaintiff was put on sufficient notice at that time to start the running of the limitations period. *Jackson* v. *Anderson*, 355 Ill. 550, 557, 189 N.E. 924 (1934); *Bush* v. *Continental Casualty Co.*, 116 Ill. App. 2d 94, 253 N.E. 2d 619 (1969); *Nogle* v. *Nogle*, 53 Ill. App. 2d 457, 465, 202 N.E. 2d 683 (1964).

2. PLAINTIFF COULD NOT AVOID THE LIMITATIONS BAR SINCE IT FAILED TO ALLEGE OR PROVE ANY AFFIRMATIVE ACT OF FRAUDULENT CONCEALMENT.

Plaintiff's attempt to avoid the limitations bar by merely alleging that defendant had fraudulently concealed the cause of action from plaintiff failed to specify any affirmative act of concealment on the part of defendant, as is required by Illinois law, and plaintiff, at trial, failed to produce any such evidence whatsoever. Thus, as a matter of law, plaintiff was barred from instituting this action against defendant. *Skrodyki* v. *Sherman State Bank,* 348 Ill. 403, 407, 181 N.E. 325, 327 (1932); *Fortune* v. *English,* 226 Ill. 262, 268-269, 80 N.E. 781 (1907); *Mathews* v. *Atlas Liquors, Inc.,* 132 Ill.App.2d 608, 270 N.E.2d 453, 455 (1971); *Nogle* v. *Nogle,* 53 Ill. App. 2d 457, 466, 202 N.E. 2d 683 (1964). For analogous federal decisions, *cf., Baker* v. *F. and F. Investment Co.,* 420 F.2d 1191, 1198-99 (7th Cir. 1970); *Burnham Chemical Co.* v. *Borax Consolidated,* 170 F.2d 569, 573-574, n.4 (9th Cir. 1948), *cert. denied,* 336 U.S. 924.[1]

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[1] Plaintiff itself recognizes this principle in its citation of the Illinois case of *Ohlendorf* v. *Bennett,* 241 Ill.App. 537, 565 (1926), which states the "reasonable diligence" rule. However, the two United States Supreme Court cases cited at page 19 of plaintiff's Petition were not decided under the Illinois statute and thus do not accurately state the criteria applied in Illinois to the statutory fraudulent concealment exception.

B. THE PROCEDURAL ARGUMENTS RAISED BY PLAINTIFF FOR THE FIRST TIME ON APPEAL ARE WITHOUT MERIT SINCE A FULL AND FAIR TRIAL WAS CONDUCTED BY THE COURT BELOW AND SINCE PLAINTIFF RAISED NO OBJECTION TO THE PROCEEDINGS.

1. THE DISTRICT COURT, WITHOUT OBJECTION, HELD A FULL TRIAL ON THE LIMITATIONS ISSUE AND DID NOT DECIDE IT SUMMARILY.

Plaintiff's contention that the limitations issue was decided summarily is entirely without merit and, in addition, was raised for the first time on appeal. First, plaintiff asked the district court to allow it to present evidence on the limitations issue. The court granted that request and, pursuant to Rules 42(b) and 43(e), Federal Rules of Civil Procedure, held a full trial on that issue without any objection by plaintiff. At that trial, plaintiff voluntarily presented evidence and brought witnesses from Minnesota to testify.[2]

In addition, at no time, until it filed its brief in the court of appeals, did plaintiff complain that it was not afforded full procedural safeguards.

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[2] Plaintiff, in its Petition (at p. 6) makes reference to the district court's apology "for the piecemeal fashion" in which the court was trying the limitations issue. (App. 147-C.) This remark was made at the beginning of the second hearing, and *did not relate* to the fact that the limitations issue was being tried separately, but related only to the necessity of having to postpone the second hearing for several weeks due to other more urgent intervening judicial business. Defendant pointed this out in its brief filed in the court of appeals but plaintiff has nevertheless made the same incorrect inference here.

Thus, the procedure followed by the district court was entirely appropriate under both the Rules and the case law,[3] and plaintiff, by its actions and full participation in the trial, without objection, is precluded from raising these procedural issues as an afterthought for the first time on appeal. Rule 46, Federal Rules of Civil Procedure; *Brown* v. *Wisconsin State Department of Public Welfare,* 457 F.2d 257 (7th Cir. 1972); *Desert Palace, Inc.* v. *Salisbury,* 401 F.2d 320, 324 (7th Cir. 1968); *Occidental Petroleum Corp.* v. *Walker,* 289 F.2d 1, 6 (10th Cir. 1961).

2. PLAINTIFF WAIVED ANY RIGHT IT MAY HAVE HAD TO A JURY TRIAL ON THE LIMITATIONS ISSUE SINCE IT PROCEEDED WITHOUT OBJECTION TO PARTICIPATE IN THE TRIAL OF THAT ISSUE BEFORE THE COURT.

Plaintiff's contention that it was entitled to a jury trial on the limitations issue likewise ignores the basic fact that it proceeded to the trial of that issue before the court without objection. During the more than seven weeks which transpired between the issuance of the memorandum opinion ordering the factual hearing and the conclusion of the proceedings below, no mention was made of plaintiff's now-asserted desire to have a jury decide the issue. Instead, plaintiff proceeded to present its case and take full advantage of its rights in the court below. Moreover, no post-trial motions of any kind were filed by plaintiff,

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[3] See *Burnham Chemical Co.* v. *Borax Consolidated, supra,* 170 F.2d 569, 572-573, 575 (9th Cir. 1948), *cert. denied,* 336 U.S. 924; *Momand* v. *Paramount Pictures Dist. Co.,* 36 F.Supp. 568, 571 (D. Mass. 1941); *Seaboard Terminals Corp.* v. *Standard Oil Co.,* 30 F.Supp. 671, 672 (S.D.N.Y. 1939); 5 Moore's Fed. Prac. ¶42.03.

either on the jury issue or otherwise. In fact, the first time the jury question (or any other procedural issue) was raised was in the plaintiff's brief in the court of appeals.

The law is clear that such inaction by a party to a lawsuit amounts to a waiver of the right to a jury trial. In *Kearney* v. *Case*, 79 U.S. 275 (1870), the applicable statute then in effect[4] provided that a jury would be empaneled unless a written waiver was filed with the court. (See 79 U.S. at 280.) Although no such waiver had been filed in *Kearney*, the parties proceeded to trial without objecting to the case being heard by the court without a jury. After an adverse judgment was rendered, the defendant appealed on the ground that a jury should have been empaneled under the statute. This Court rejected that argument, and observed that it was settled that the Seventh Amendment right to a jury trial "might be waived by the parties, and that the judgment of the court in such cases should be valid." 79 U.S. at 281. Despite the statutory requirement of a written waiver, the Court went on to hold (79 U.S. at 284):

> "When we consider the cases already cited, in which such a waiver has been implied, and that the right to have a jury when a party demands it, is so universally known and respected, we think that it is almost a necessary inference, where a party is present by counsel and goes to trial before the court without objection or exception, he has voluntarily waived his right to a jury, and must be held in this court to the legal

[4] Judiciary Act of 1865, §4, 13 Statutes at Large 501 (Appendix B of this responsive brief).

consequences of such a waiver. *Phillips* v. *Preston*, 5 How. 290."[5]

Any other rule would mean that a party could, by silence, permit a judge to try the case and then insist upon a re-trial if the judgment went against him.

In the instant case, plaintiff appeared at the trial below with both local counsel and Minnesota house counsel present, presented witnesses and documentary evidence, and argued its case to the court without any mention of a desire to have a jury empaneled at the trial of the limitations issue. There could hardly be a more explicit case of waiver by one's actions than is presented by this case.

The procedural points raised by plaintiff's Petition—points touched upon only tangentially by plaintiff's counsel at argument before the court of appeals, and on which both the majority and dissenting opinions agreed—amount to nothing more than an afterthought on its part, which may not be asserted for the first time on appeal. See *Desert Palace, Inc.* v. *Salisbury, supra,* 401 F.2d at 324 (7th Cir. 1968); *Brown* v. *Wisconsin State Dept. of Public Welfare, supra,* 457 F.2d 257 (7th Cir. 1972).

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[5] See also, *Smith* v. *Cushman Motors Works,* 178 F.2d 153, 154 (8th Cir. 1950) (consent by parties to try determinative preliminary issue before court constitutes waiver of jury demand); *Maytag Co.* v. *Meadows Mfg. Co.,* 45 F.2d 299, 301-302 (7th Cir. 1931) (submission without objection of issue of damages to a master amounts to a waiver of the right to a jury trial); *Bradley* v. *Maryland Casualty Co.,* 382 F.2d 415, 420 (8th Cir. 1967); *West* v. *Devitt,* 311 F.2d 787, 788 (8th Cir. 1963) (denial of mandamus to compel a jury trial of the issue of laches where, although a jury demand had been filed, the parties had agreed to try the issue before the court).

CONCLUSION

Plaintiff fails to assert any proper ground for the granting of certiorari in the instant case. The Petition represents merely the final attempt to re-litigate the statute of limitations issue it lost in the district court.

The record below clearly establishes that the five-year Illinois statute of limitations barred the institution of the present action, and that plaintiff's attempt to avoid this bar was fatally deficient both in its allegations and its presentation of evidence at the trial. The finding by the district court that the limitations period had run was amply supported by uncontradicted evidence and should be affirmed on the merits.

Further, the procedural issues raised by plaintiff for the first time on appeal are without merit. After asking the trial court to allow it the opportunity to prove its general allegations of fraudulent concealment, plaintiff went to trial on that issue without objection. Until plaintiff filed its brief in the Seventh Circuit, no request was ever made—either before, during, or after the proceedings below—that a jury be empaneled to try the limitations issue. Thus, plaintiff waived any right it may have had to a jury, and was accorded full procedural due process in the district court.

Surely a litigant cannot await the outcome of a bench trial and then, if it loses, assert its own participation as error, for the first time on appeal.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

EDGAR BERNHARD
ROBERT W. GETTLEMAN
Attorneys for respondent
33 North LaSalle Street
Chicago, Illinois 60602
312 CE 6-9200

Of Counsel,
SELWYN ZUN
MORTON DENLOW
D'ANCONA, PFLAUM, WYATT & RISKIND
33 North LaSalle Street
Chicago, Illinois
CE 6-9200